

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re Scotts EZ Seed Litigation

Civil Action No. 12-CV-4727 (VB)

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO PRECLUDE  
SCOTTS FROM OFFERING EXPERT TESTIMONY BY ERIC NELSON AND  
MICHAEL FAUST CONCERNING EZ SEED'S PERFORMANCE AT HALF-WATER  
LEVELS**

Dated: June 30, 2016

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## I. INTRODUCTION

Fed. R. Evid. 702(b) requires that all testimony by expert witnesses be “based on sufficient facts or data.” But Scotts never tested EZ Seed at half-water levels. As a result, Eric Nelson and Michael Faust must be precluded from testifying about EZ Seed’s performance at half-water levels because they lack any facts or data on which to base their testimony.

First, 6 of the 18 Trials Scotts produced in this action (the “Trials”) [REDACTED]

[REDACTED] t that was sold to Plaintiffs and Class members.

Second, Dr. Nelson and Mr. Faust expressly conceded at their depositions that 5 of 18 Trials [REDACTED]

Third, 18 of 18 Trials [REDACTED]

Marchese Decl. Ex. OO, Karcher Report at 15; *see also* SOF ¶ 683. [REDACTED]

[REDACTED]. *See* SOF ¶ 682.

Fourth, Scotts never tested EZ Seed against ordinary seed [REDACTED] SOF ¶ 684. In each of Scotts 18 trials, [REDACTED]

[REDACTED] Marchese Decl. Ex. OO, Karcher Report ¶ 2; *see also* SOF ¶ 684. These included failing to rake, fertilize or mulch the ordinary seed in every instance. *See id.*

Fifth, 18 of 18 Trials [REDACTED]

Sixth, 11 of 18 Trials are [REDACTED]

[REDACTED] As a result, they are untestable and cannot be replicated.

## **II. THE LEGAL STANDARDS FOR THE ADMISSIBILITY OF EXPERT TESTIMONY**

Rule 702 provides that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's testimony (1) is based on sufficient facts or data; (2) is the product of reliable principles and methods; and (3) has reliably applied the principles and methods to the facts of the case. *See* Fed. R. Evid. 702. Under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993), trial courts serve as gatekeepers for expert testimony. It is appropriate for district courts to decide questions regarding the admissibility of expert testimony on summary judgment. *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997).

"Rule 702 requires a trial court to make an initial determination as to whether the proposed witness qualifies as an expert. If this threshold requirement is met, then a court must inquire into whether the scientific, technical or other specialized testimony provided by that expert is both relevant and reliable." *Baker v. Urban Outfitters, Inc.*, 254 F. Supp. 2d 346, 352-53 (S.D.N.Y. 2003).

"In keeping with the liberal thrust of the Federal Rules [of Evidence] and their general approach of relaxing the traditional barriers to opinion testimony, the standard for qualifying expert witnesses is liberal." *In re Zyprexa Prods. Liability Litig.*, 489 F. Supp. 2d 230, 282 (E.D.N.Y. 2007) (citation and internal quotation marks omitted). Thus, when an expert's "educational and experiential qualifications in a general field [are] closely related to the subject matter in question, the court will not exclude the testimony solely on the ground that the witness lacks expertise in the specialized areas that are directly pertinent." *Id.*; *see also McCulloch v.*

*H.B. Fuller Co.*, 61 F.3d 1038, 1042-43 (2d Cir. 1995) (allowing expert to testify as to matters generally within his academic and practical experience even though he lacked formal training as to precise scientific issue in dispute); *Russo v. Keough's Turn of the River Hardware, LLC*, 2012 WL 4466626, at \*3 (S.D.N.Y. Sept. 25, 2012) (expert should not be barred from testifying merely because he or she lacks a degree or training narrowly matching the point of dispute in the lawsuit) aff'd, 529 F. App'x 50 (2d Cir. 2013) (summary order).

The Court must ensure any and all scientific testimony or evidence admitted is not only relevant, but reliable. *Kass v. W. Bend Co.*, 2004 WL 2475606, at \*4 (E.D.N.Y. Nov. 4, 2004). “In *Daubert*, the Supreme Court articulated four factors pertinent to determining the reliability of an expert’s reasoning or methodology: (1) whether the theory or technique relied on has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential rate of error and the existence and maintenance of standards controlling the technique’s operation; and (4) whether the theory or method has been generally accepted by the scientific community.” *Id.* However, these factors do not constitute a definitive checklist or test and the admissibility of expert testimony depends on the particular circumstances of the case. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999). Expert testimony is presumptively reliable. *See, e.g., UMG Recordings, Inc. v. Lindor*, 531 F. Supp. 2d 453, 456 (E.D.N.Y. 2007).

The proponent of expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence. *Baker v. Urban Outfitters, Inc.*, 254 F. Supp. 2d at 353.

“[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert.” *Id.* (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). Nevertheless, “the trial judge [has]

considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable,” and enjoys “the same kind of latitude in deciding how to test an expert’s reliability.” *Kumho Tire Co. v. Carmichael*, 526 U.S. at 152.<sup>1</sup>

### III. 6 OF THE 18 TRIALS [REDACTED]

6 of Scotts’ 18 EZ Seed Trials cannot show EZ Seed’s performance at half-water levels because [REDACTED] (EZ Seed Field Trials 1, 2, and 3 and the UGA, UF, and UC Trials). [REDACTED]

[REDACTED]. SOF ¶ 137. However, as shown in the chart below, [REDACTED]

[REDACTED]:

---

<sup>1</sup> The foregoing discussion of the legal standards for admissibility of expert testimony was taken largely from this Court’s opinion in *Marcus v. Quattrocchi*, 2014 WL 521340, at \*15-16 (S.D.N.Y. Feb. 4, 2014).

Since these Trials completely [REDACTED]

[REDACTED] As such, any conclusions that Dr. Nelson and Mr. Faust may attempt to draw regarding the half-water performance of EZ seed based on these Trials would be “speculative at best.” *Russo v. Keough’s Turn of the River Hardware, LLC*, 2012 WL 4466626, at \*4 (S.D.N.Y. Sep. 25, 2012); *see also Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (“[N]othing in either *Daubert* or the Federal

Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”). Testimony regarding EZ Seed’s performance at half-water levels based on these Trials must therefore be precluded.

**IV. DR. NELSON AND MR. FAUST CONCEDED THAT** [REDACTED]

During their depositions, Dr. Nelson and Mr. Faust conceded that another [REDACTED]

[REDACTED] (EZ Seed Greenhouse Trials 1, 2, and 3 and EZ Seed Field Trials 5 and 7).

**EZ Seed Greenhouse Trial 1**

The plots in EZ Seed Greenhouse Trial 1 [REDACTED]

[REDACTED] SOF ¶¶ 291, 304-07. At his deposition, Mr. Faust conceded that [REDACTED]

[REDACTED]

■ [REDACTED]  
[REDACTED]

■ [REDACTED]

Marchese Decl. Ex. ZZ, Faust Dep. at 102:8-10; SOF ¶ 293. [REDACTED]

[REDACTED]

■ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

■ [REDACTED]  
[REDACTED]

Marchese Decl. Ex. ZZ, Faust Dep. at 102:11-18; SOF ¶ 294. EZ Seed Greenhouse Trial 1 therefore fails to provide adequate facts or data to support any opinion on EZ Seed's performance at half-water levels.

**EZ Seed Greenhouse Trial 2**

The plots in EZ Seed Greenhouse Trial 2 [REDACTED]

[REDACTED] SOF ¶¶ 322, 334-37. At his deposition, Mr. Faust conceded that [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] [REDACTED]

Marchese Decl. Ex. ZZ, Faust Dep. at 108:22-109:1; SOF ¶ 324. Mr. Faust also testified that [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] [REDACTED]

Marchese Decl. Ex. ZZ, Faust Dep. at 111:8-13; SOF ¶ 325. EZ Seed Greenhouse Trial 2 therefore fails to provide adequate facts or data to support any opinion on EZ Seed's performance at half-water levels.

**EZ Seed Greenhouse Trial 3**

The plots in EZ Seed Greenhouse Trial 3 [REDACTED]

[REDACTED] SOF ¶¶ 352, 377-380. At his deposition, Mr. Faust conceded that [REDACTED]

[REDACTED]

■ [REDACTED]  
[REDACTED]

■ [REDACTED]

Marchese Decl. Ex. ZZ, Faust Dep. at 115:13-15; SOF ¶ 357. [REDACTED]

[REDACTED]

■ [REDACTED]  
[REDACTED]  
[REDACTED]

■ [REDACTED]  
[REDACTED]  
[REDACTED]

Marchese Decl. Ex. ZZ, Faust Dep. at 111:8-13; SOF ¶ 358. EZ Seed Greenhouse Trial 3 therefore fails to provide adequate facts or data to support any opinion on EZ Seed's performance at half-water levels.

**EZ Seed Field Trial 5**

The plots in EZ Seed Field Trial 5 [REDACTED] SOF ¶¶ 395-96.

[REDACTED]

[REDACTED] SOF ¶¶ 397-98. Because of this, Dr. Nelson conceded at his deposition that [REDACTED]

[REDACTED]

■ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
■

■ [REDACTED]

Marchese Decl. Ex. NN, 8/27/15 Nelson Dep. at 279:20-280:8; SOF ¶ 401. EZ Seed Field Trial 5 therefore fails to provide adequate facts or data to support any opinion on EZ Seed's performance at half-water levels.

**EZ Seed Field Trial 7**

The plots in EZ Seed Field Trial 7 [REDACTED]

[REDACTED] SOF ¶ 407. [REDACTED]

[REDACTED]  
SOF ¶¶ 480-82. Because of this, Dr. Nelson conceded at his deposition that [REDACTED]  
[REDACTED]

[REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED]

Marchese Decl. Ex. NN, 8/27/15 Nelson Dep. at 291:15-24; SOF ¶ 489. EZ Seed Field Trial 7 therefore fails to provide adequate facts or data to support any opinion on EZ Seed's performance at half-water levels.

**V. 18 OF 18 TRIALS [REDACTED]**

Scotts' 18 Trials uniformly lack sufficient facts or data to show EZ Seed's performance at half-water levels because [REDACTED]

[REDACTED] Scotts recommends watering ordinary seed "as needed to keep the soil surface moist" "but not soggy wet." SOF ¶ 82. This is an industry standard recommendation that is widely accepted by turfgrass scientists. *Id.*

The amount of water required to keep the soil surface moist depends on weather conditions. *Id.* ¶ 170. Water is lost from the soil surface due to evaporation from the soil and transpiration from plants. This is called evapotranspiration (ET). SOF ¶ 89. The rate of daily

ET can be estimated by plugging weather data (solar radiation, temperature, humidity, and wind) into published equations. SOF ¶ 91.

The amount of water required to “to keep the soil surface moist” is determined based on weather data and a mathematical formula. Indeed, the United States Department of Agriculture publishes weather data and formulas for calculating ET for this very purpose. This is illustrated by one of the publications Scotts’ counsel introduced during Dr. Karcher’s deposition:

- [REDACTED]
- [REDACTED]
- [REDACTED]  
[REDACTED]  
[REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- [REDACTED]
- [REDACTED]  
[REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- [REDACTED]
- [REDACTED]

■ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

■ [REDACTED]

■ [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

■ [REDACTED]

Marchese Decl. Ex. TT, Karcher Dep. at 276:19-278:22. *See also* SOF ¶¶ 93-101.

■ [REDACTED]  
[REDACTED]  
[REDACTED]

■ [REDACTED]

■

■ [REDACTED]  
[REDACTED]

■ [REDACTED]  
[REDACTED]

■

■ [REDACTED]  
[REDACTED]  
[REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

Marchese Decl. Ex. TT, Karcher Dep. at 281:19-282:17. *See also* SOF ¶¶ 93-101.

This government-sponsored publication notes that the “standardized computation procedure” for calculating reference ET using the Penman-Monteith equation “has been adopted

by the research community, most manufacturers of weather stations, and the public weather networks.” SOF ¶ 99; Marchese Decl. Ex. AAA, at 4; Marchese Decl. Ex. TT, Karcher Dep. at 283:9-15. Private companies that manufacture and sell turfgrass irrigation systems similarly compile and distribute weather data and formulas for ET-based irrigation of turfgrass. Rain Master Control Systems, which sells turfgrass irrigation equipment, “has compiled evapotranspiration data for every ZIP code in the United States.” SOF ¶ 102. As Dr. Karcher explains: [REDACTED]

[REDACTED]

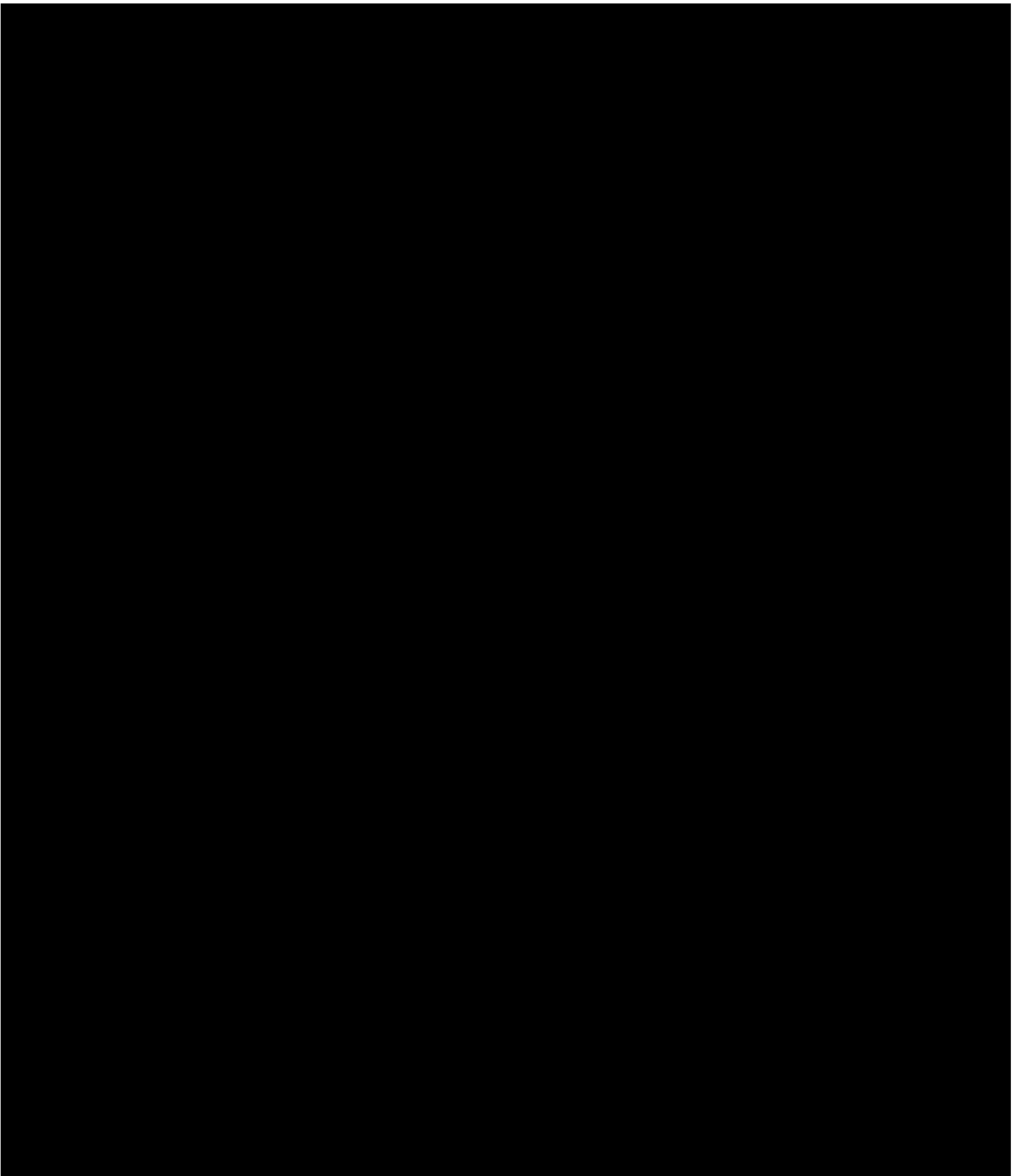
[REDACTED] Marchese Decl. Ex. TT, Karcher Dep. at 286:18-287:1.

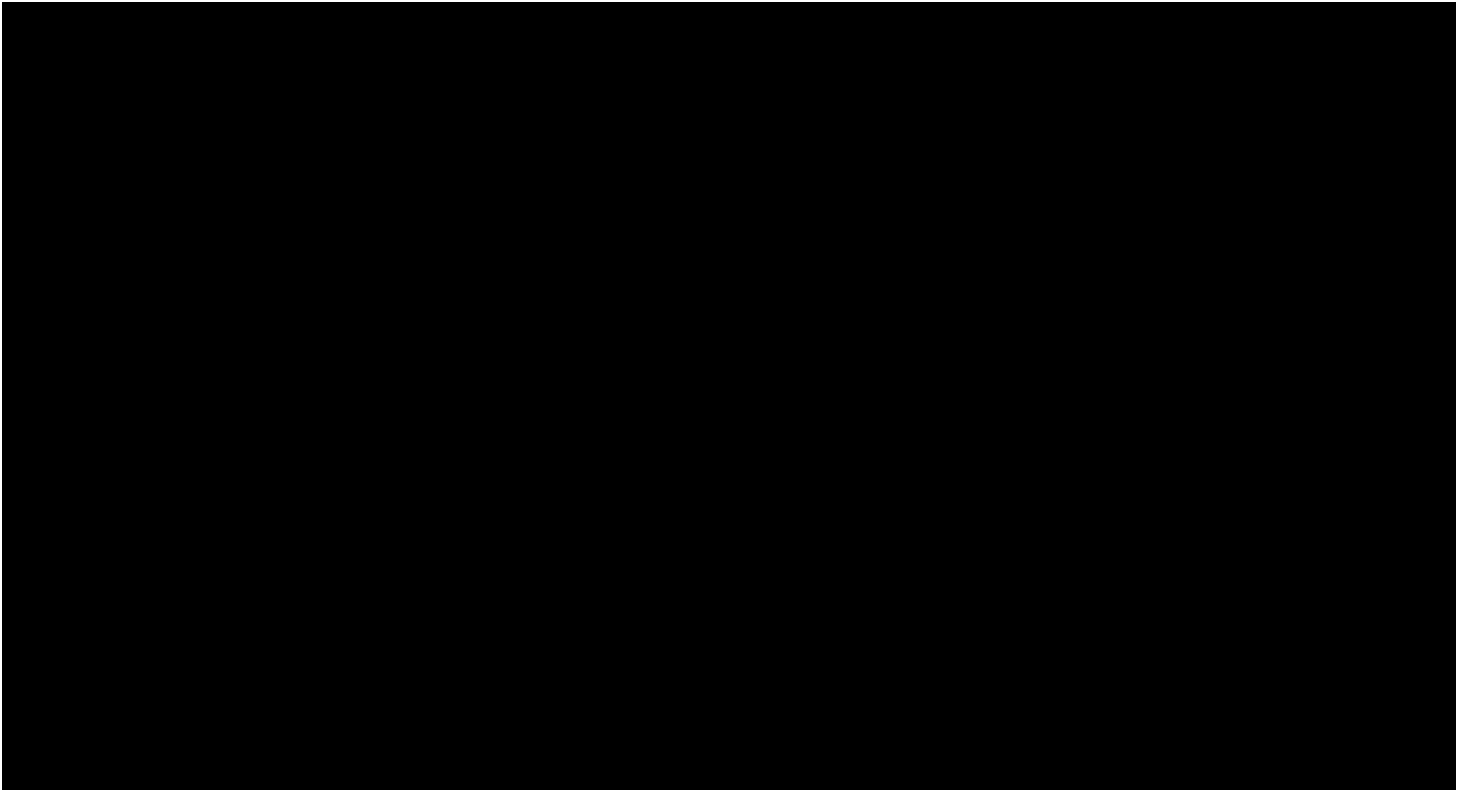
Scotts never bothered [REDACTED] for any of the 18 Trials it conducted.

[REDACTED]

[REDACTED]

[REDACTED]





As reflected in the chart above, Scotts failed to [REDACTED] in all of the 18 trials for a number of reasons. First, Dr. Nelson and Mr. Faust [REDACTED] [REDACTED] (EZ Seed Greenhouse Trials 1, 2, and 3, EZ Seed Bermudagrass Greenhouse Trial, and EZ Seed Field Trials 5 and 7). SOF ¶¶ 307, 337, 380, 398, 426, 481. Because of this, these Trials do not provide sufficient facts or data from which Dr. Nelson and Mr. Faust can draw any conclusions about EZ Seed's performance at half-water levels.

Second, because Dr. Nelson and Mr. Faust [REDACTED] [REDACTED] (EZ Seed Field Trials 1, 2, 4, 5, 6, and 7, the UGA Trial, the UF Trial, and the UC Trial), [REDACTED]. SOF ¶¶ 153, 195, 392, 453, 485, 519, 554, 586. At his deposition, Dr. Nelson agreed that [REDACTED]

[REDACTED] Marchese Decl. Ex. NN, 8/27/15 Nelson Dep. at 254:17-23,

SOF ¶ 157. Mr. Faust also agreed that “[REDACTED]”  
 [REDACTED] Marchese Decl. Ex. ZZ, Faust Dep. at 76:7-11; SOF ¶ 158. Without knowing the  
 [REDACTED], no conclusions can appropriately be drawn about EZ  
 Seed’s performance at half-water levels from these trials.<sup>2</sup>

Third, [REDACTED] (EZ Seed Field Trials  
 1, 2, 5, 6, and 7, EZ Seed Greenhouse Trial 3, and the EZ Seed Bermudagrass Greenhouse Trial).  
 In these trials, [REDACTED]  
 [REDACTED] SOF ¶¶ 144, 186, 352, 390, 420, 446, 481. In each instance,  
 Dr. Nelson and Mr. Faust could not say [REDACTED]  
 [REDACTED]. SOF ¶¶ 146, 188, 353, 397, 447, 481. When asked about this [REDACTED]  
 [REDACTED] Mr. Faust stated: [REDACTED]  
 [REDACTED] Marchese Decl. Ex. ZZ,  
 Faust Dep. at 88:22-24; SOF ¶ 148. [REDACTED], no  
 conclusions can be drawn about EZ Seed’s performance at half-water levels from these Trials.

Fourth, in 9 of 18 trials, Dr. Nelson and/or Mr. Faust [REDACTED]  
 [REDACTED]  
 [REDACTED] (EZ Seed Field Trials 1, 2, 3, 4, and 6, EZ Seed Greenhouse Trial 4, the UGA Trial,  
 the UF Trial, and the UC Trial). SOF ¶¶ 171, 213, 243, 279, 465, 500, 538, 570, 602. There was  
 no basis for doing so. Both Nelson and Faust conceded at their depositions that the  
 [REDACTED]. *See*  
 Marchese Decl. Ex. NN, 8/27/15 Nelson Dep. at 239:11-16; SOF ¶ 170 [REDACTED]

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<sup>2</sup> [REDACTED] SOF ¶ 232. [REDACTED]  
 [REDACTED]  
 [REDACTED]. SOF ¶ 233.

██████████); Marchese Decl. Ex. ZZ, Faust Dep. at 70:16-20; SOF ¶ 170 ██████████

██████████). Nelson and Faust attempted to defend their decision ██████████

██████████ SOF ¶¶ 171 (Nelson Dep. at 247:18-23; Faust Dep. at 56:23-57:5). But that is flat wrong. Dr. Peacock's paper, "Water Requirements of North Carolina Turfgrasses," never recommends a standard amount of water to apply, but rather specifically advocates for ET-based irrigation, *i.e.* varying irrigation frequencies and amount to replace moisture lost from the soil as needed. *Id.* ¶ 171 (citing Karcher Report at 15) ██████████

██████████). And as shown in the chart above, ██████████ grossly exceeded the applicable ET rates in every instance.

Fifth, in the remaining three Trials, Dr. Nelson ██████████

██████████ SOF ¶¶ 623, 647, 671 (Relative Performance of EZ Seed Bermudagrass and its Ordinary Seed Counterpart under Reduced Moisture Conditions, Relative Performance of EZ Seed Bermudagrass and its Ordinary Seed Counterpart under Reduced Moisture Conditions, and Relative Performance of EZ Seed for Tall Fescue Lawns Formulation and its Ordinary Seed Counterpart under Reduced Moisture Conditions). In doing so, ██████████

██████████ SOF ¶¶ 628, 652, 676. Even Mr. Faust conceded that ██████████  
██████████ as Scotts recommends its customers do when planting grass seed. Marchese Decl. Ex. ZZ, Faust Dep. at 122:13-22; SOF ¶

627. It similarly runs afoul of Scotts' instructions to its customers that the soil should not be "soggy wet" after irrigating newly planted grass seed. SOF ¶ 652. And in any event, [REDACTED] half the recommended rate for watering ordinary grass seed. SOF ¶ 629.

#### VI. 18 OF 18 TRIALS [REDACTED]

All 18 trials similarly fail to provide facts or data sufficient to show the EZ Seed is capable of growing 50% thicker with half the water because [REDACTED]

Unlike EZ Seed, ordinary seed needs to be raked when planted to ensure good seed to soil contact. Marchese Decl. Ex. NN, Nelson Dep. at 245:17-20; SOF ¶ 639 ([REDACTED]); Marchese Decl. Ex. ZZ, Faust Dep. at 34:8-13; SOF ¶ 639 ([REDACTED]); Marchese Decl. Ex. ZZ, Faust Dep. at 40:1-4; SOF ¶ 640 [REDACTED]).

Similarly, unlike EZ Seed, which contains fertilizer, proper care for establishing new turfgrass from ordinary seed requires use of a starter fertilizer. *See* Marchese Decl. Ex. NN, 8/27/15 Nelson Dep. at 248:1-3; SOF ¶ 165 ([REDACTED]); Marchese Decl. Ex. ZZ, Faust Dep. at 74:17-19; SOF ¶ 165 [REDACTED]); Marchese Decl. Ex. OO, Karcher Report at 17, SOF ¶ 165.

Finally, unlike EZ Seed, which contains mulch, proper care for ordinary seed requires the application of a mulch, usually straw, to reduce the rate of soil drying, buffer soil temperatures, and help prevent seed losses due to soil erosion. Marchese Decl. Ex. NN, Nelson Dep. at 249:6-13; SOF ¶ 106 [REDACTED]

[REDACTED]); Marchese Decl. Ex. ZZ, Faust Dep. at 74:17-19; SOF ¶ 106 [REDACTED]

[REDACTED]); Marchese Decl. Ex. OO, Karcher Report at 7-8, SOF ¶ 106

[REDACTED]); Marchese Decl. Ex. TT, Karcher Dep. at 198:3-10, SOF ¶ 16 [REDACTED]

[REDACTED]

[REDACTED]).

Here, Scotts [REDACTED]

[REDACTED]:

[REDACTED]

[REDACTED]

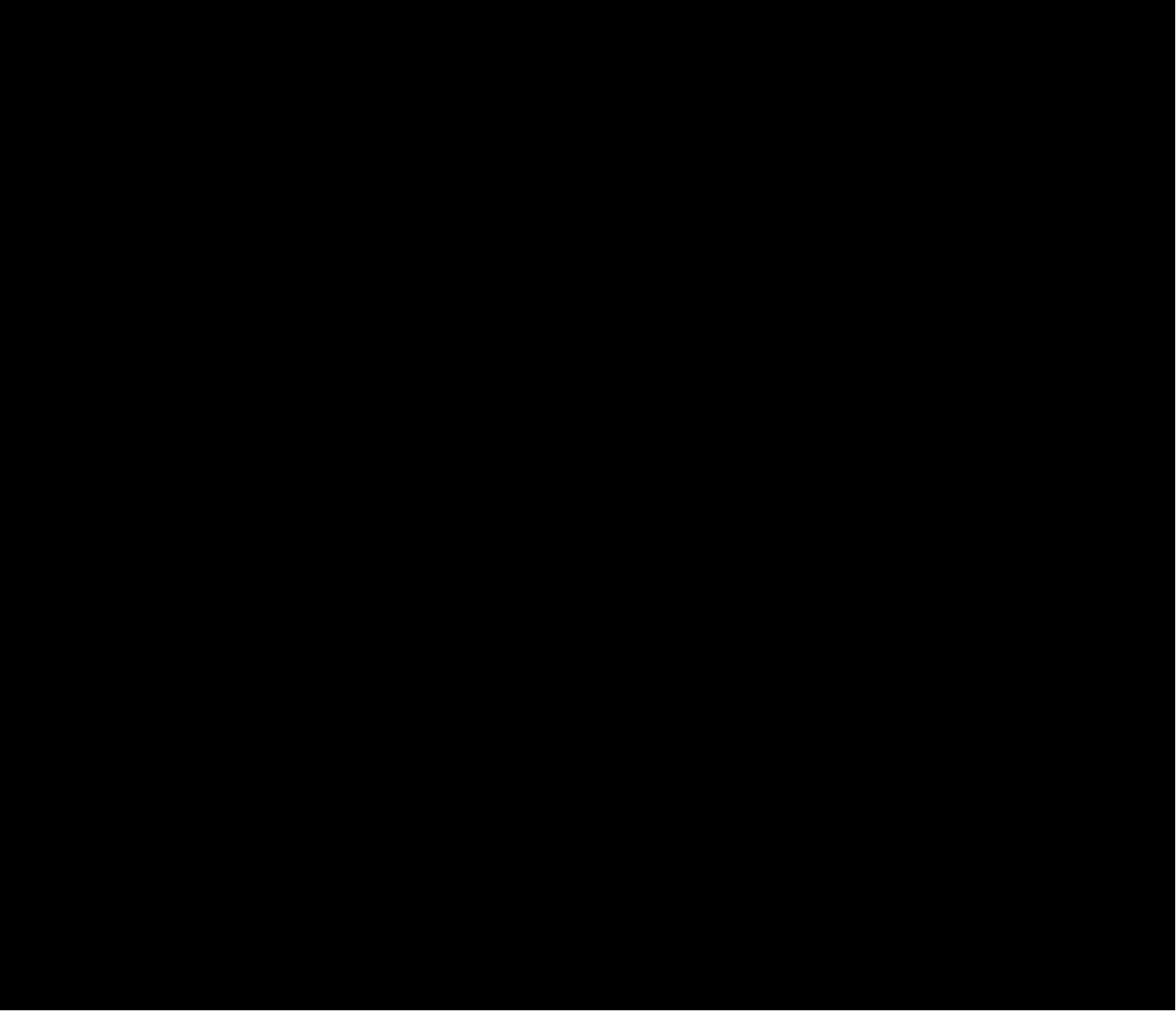
Scotts' Trials therefore fail to provide adequate facts or data to support any opinion that EZ Seed's is capable of growing 50% thicker with half the water, subject to proper care.


**VII. 18 OF 18 TRIALS** [REDACTED]  
[REDACTED]

Scotts also [REDACTED]. EZ Seed's directions for use specified that EZ Seed should be applied at a thin 1/8-inch layer. Marchese Decl. Ex. ZZ, Faust Dep. at 11:10-11; SOF ¶ 142 (" [REDACTED] [REDACTED]). But Scotts [REDACTED]. *Id.* at 50:17-19, SOF ¶ 143 [REDACTED] [REDACTED]). All 18 trials therefore fail to provide adequate facts or data to support any opinion that EZ Seed's is capable of growing 50% thicker with half the water when used as directed.

Nelson and Faust contend that [REDACTED] [REDACTED]. Marchese Decl. Ex. NN, 8/27/15 Nelson Dep. at 287:12-22; Marchese Decl. Ex. ZZ, Faust Dep. at 51:1-6.; Marchese Decl. Ex. OO, Karcher Report at 9; SOF ¶ 182. But 8 trials [REDACTED]:

[REDACTED]



, they fail to provide adequate facts or data to support any opinion that EZ Seed is capable of growing 50% thicker with half the water when used as directed.

**VIII. 11 OF 18 TRIALS FAIL UNDER *DAUBERT* BECAUSE THEY CANNOT BE REPLICATED**

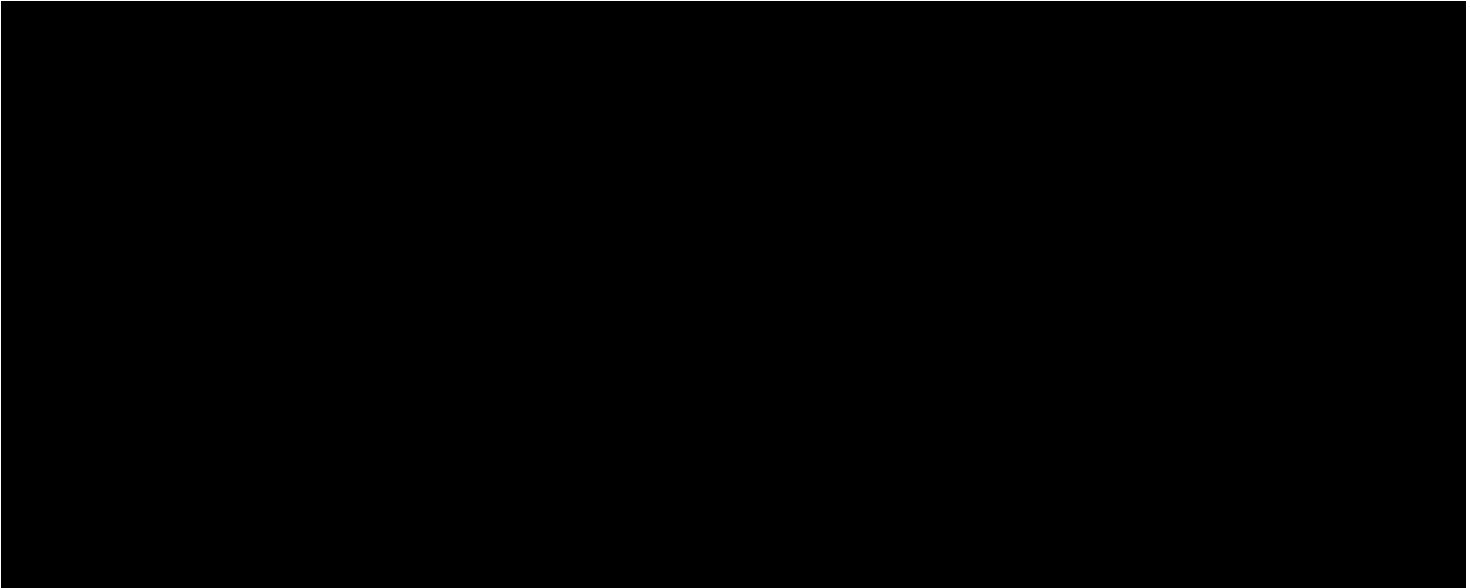
At least 11 of 18 Trials fail under a *Daubert* analysis because they cannot be replicated.

“An expert must offer good reason to think that his approach produces an accurate estimate using professional methods, and that estimate must be testable. Someone else using the same data and methods must be able to replicate the result.” *Lava Trading, Inc. v. Hartford Fire Ins. Co.*, 2005 U.S. Dist. LEXIS 4566, at \*50 (S.D.N.Y. Feb. 14, 2005) (quoting *Zenith Elecs. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005) (Easterbrook, J.)). Here, these Trials provide insufficient information regarding the data and methods to replicate their results [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



Without this information, these trials are untestable and cannot be replicated. They therefore cannot be relied upon for testimony regarding EZ Seed's performance at half-water levels.

### **CONCLUSION**

For the reasons set forth above, Plaintiffs respectfully request that the Court preclude Scotts from offering expert testimony by Eric Nelson and Michael Faust concerning EZ Seed's performance at half-water levels.

Dated: June 30, 2016

Respectfully submitted,

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